

Sixth Amendment

Testimonial Statement

Commonwealth v. DeOliveira

Supreme Judicial Court, June 19, 2006

A child's statements to an emergency room pediatrician that she had been sexually assaulted were held not to be "testimonial" under Crawford and Gonsalves and were therefore admissible because they were made for the purpose of diagnosis and treatment.

After the 6 year-old victim initially disclosed that she had been sexually assaulted by her mother's live-in boyfriend, police officers responded to the scene and transported the victim and her mother to the emergency room so the victim could receive a medical assessment for sexual abuse. At the hospital, the doctor questioned the victim and the child disclosed that the defendant raped her. The doctor also examined the victim to determine whether there had been sexual abuse. As a result of the examination, the doctor filed a report in accordance with c. 119, §51A. The defendant was indicted for the forcible rape of a child under 16 years of age. The child was legally unavailable for trial. The Superior Court excluded the victim's statements made to the doctor, and the Commonwealth filed an interlocutory appeal. The SJC transferred the case on its own initiative.

Pursuant to *Comm. v. Gonsalves*, 445 Mass. 1 (2005), the SJC held that the 6 year-old victim's statements were not "testimonial per se" since they were not made in response to police interrogation. Although police officers were present at the hospital and explained to the doctor prior to examining the victim that there was an allegation of sexual abuse, there was no indication the police were present during the doctor's examination of the victim, or that they instructed the doctor on the manner in which his examination should proceed. Despite the fact that the doctor was aware at the time he conducted the examination that he may be called to testify about his findings at a later trial, the court still held the statements admissible because the doctor stated that this awareness would not affect the manner

in which he treats a patient under his care and works "absolutely" independently of the police.

With respect to the "testimonial in fact" test, the SJC adopted a case-by-case approach, and in this case held that "a reasonable person in [the victim's] position and armed with her knowledge, could not have anticipated that her statements might be used in a prosecution against the defendant." Therefore, since the statements were not testimonial they were admissible as statements made for the purpose of diagnosis and treatment - an established exception to the hearsay rule.

Note: It is important to note that any statements made to a physician that go directly to the defendant's identity would not be admissible since they are not made for the purposes of diagnosis and treatment and instead go directly to a defendant's guilt. In this case, the Commonwealth conceded that any reference to the defendant as her assailant should be redacted.